72-80

FILED
JUL 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. .....

MARTIN ERDMANN,

Petitioner,

—v.—

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPFERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as Clerk of the said Appellate Division,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM LEIBOVITZ
ELLIS STRINGFELLOW PATTON & LEIBOVITZ
51 East 42nd Street
New York, New York 10017

PAUL G. CHEVIGNY
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions 3

Statement of the Case 4

REASONS FOR GRANTING THE WRIT

1. The decision below has decided an important question of federal law which has not been, but should be, settled by this Court, and has misapplied principles set forth in decisions of this Court 8

   Special Circumstances 9

   Federal-State Comity 14

   Administrative Nature of the Proceeding 16

2. The decision below raises important First Amendment issues broadly affecting the national bar 19

CONCLUSION 25

APPENDIX:

Opinion of the United States Court of Appeals for the Second Circuit 1a

PAGE

Opinion of the United States District Court, Southern District of New York 17a

Majority Opinion of the Appellate Division, Third Department 20a

Dissenting Opinion of Greenblott, J.S.C. 25a

Order to Show Cause and Petition and Charges of the Justices of the Supreme Court, Appellate Division, First Department 29a

Table of Authorities

Cases:

Baggett v. Bullitt, 377 U.S. 360 (1964) 17

Baird v. State Bar of Arizona, 401 U.S. 7 (1971) 20

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 14

Dombrowski v. Pfister, 380 U.S. 479 (1965) 9, 21

Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970) 10, 23

Garrison v. Louisiana, 379 U.S. 64 (1964) 11, 19

Konigsberg v. State Bar of California, 353 U.S. 252 (1957) 19, 20

Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd on oth. gds.*, 401 U.S. 154 (1971) 17, 20

PAGE

Matter of Goodman, 199 N.Y. 143 (1910) 13
Mitchum v. Foster, 40 U.S.L.W. 4737 (U.S. June 19, 1972) 16, 18
Murchison, In re, 349 U.S. 133 (1955) 12

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 20
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 11

Pennekamp v. Florida, 328 U.S. 331 (1946) 19

Roudebush v. Hartke, 92 Sup. Ct. 804 (1972) 16-17

Samuels v. Mackell, 401 U.S. 66 (1971) 9
Schware v. Board of Examiners, 353 U.S. 232 (1957) 19
Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971) 10, 12
Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969) 18
Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968) 10, 16
Speiser v. Randall, 357 U.S. 513 (1958) 13
Spencer, In re, 137 App. Div. 330 (1st Dep't 1910) 15
Spevak v. Klein, 385 U.S. 511 (1967) 20
Stolar, In re, 401 U.S. 23 (1971) 20

Taylor v. Kentucky State Bar Association, 424 F.2d 478 (6th Cir. 1970) 17, 18

Wood v. Georgia, 370 U.S. 375 (1962) 19

Younger v. Harris, 401 U.S. 37 (1971) 8, 9, 10, 11, 12, 14, 15, 16

Zwickler v. Koota, 389 U.S. 241 (1967) 14

PAGE

Constitutional Provisions:

United States Constitution

First Amendment 2, 3, 4, 6, 11, 14, 15, 17, 18, 19, 20
Fifth Amendment 20
Fourteenth Amendment 2, 3, 4, 12

Statutes:

28 U.S.C. §1254(1) 2
42 U.S.C. §1983 ..... 4, 8, 9, 12, 15, 16, 17, 18
§2283 16

Other Authorities:

Bing & Rosenfeld, *The Quality of Justice: In the Lower Criminal Courts of Metropolitan Boston*, 7 CRIM. LAW BULL. 393 (June 1971) 22

Drinker, Legal Ethics 71 (1953) 24

38 J. Am. Jud. Soc'y 96 (1954) 24

Katz, *Some Call It Justice*, THE WASHINGTONIAN 46 (Sept. 1970) 21, 22

N.Y. JUDICIARY LAW §14 (McKinney's 1968) 12
§90(8) 13

Schwartz, *Judges as Tyrants*, 7 CRIM. LAW BULL. 129 (March 1971) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. .....

MARTIN ERDMANN,

Petitioner,

—v.—

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPFERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as Clerk of the said Appellate Division,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at p. 1a. The opinion of the District Court for the Southern District of New York, not reported, appears in the Appendix hereto at p. 17a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a charge which attempts to discipline a lawyer for expressing general criticism of the state judiciary to the author of a magazine article violates the right of freedom of speech under the First and Fourteenth Amendments.

2. Whether a charge which attempts to discipline a lawyer for expressing general criticism of the state judiciary to the author of a magazine article is excessively vague and overbroad under the First and Fourteenth Amendments.

3. Whether a federal court has the power to intervene in a pending state bar disciplinary proceeding.

4. Whether a patently unconstitutional charge of misconduct, together with a purpose to deprive a lawyer of First Amendment rights, in a hearing to be determined by allegedly aggrieved parties, constitute extraordinary, immediate and irreparable injury which justifies federal intervention.

5. Whether repeated prosecution of a state bar disciplinary matter, adjudged by allegedly aggrieved parties,

causes irreparable injury, both great and immediate, for purposes of federal intervention.

6. Whether state judges act administratively and as prosecutors in bringing charges previously rejected by the administrative body normally assigned to prefer such charges, and when the said state judges have disqualified themselves from adjudicating the charges.

7. Whether a state bar disciplinary proceeding is equivalent to a criminal prosecution for purposes of federal-state comity.

8. Whether a state bar disciplinary proceeding which calls no state statute into question is equivalent to a statutory criminal proceeding for purposes of federal-state comity.

Constitutional Provisions

UNITED STATES CONSTITUTION

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This civil rights action was brought in the District Court for the Southern District of New York under 42 U.S.C. §1983 by plaintiff Martin Erdmann, Chief Attorney of the New York Supreme Court staff of the Criminal Branch of The Legal Aid Society, seeking declaratory and injunctive relief against disciplinary proceedings initiated by defendants the Justices of the Appellate Division, First Department,* State of New York, and its clerk, on the ground that such proceedings infringe plaintiff's First and Fourteenth Amendment rights in a manner causing plaintiff extraordinary and immediate irreparable injury.

Plaintiff was ordered by defendants to show why he should not be punished upon charges arising from a LIFE magazine article about him, entitled "I Have Nothing To Do With Justice," by James Mills (March 12, 1971 issue) (Record, Exhibit A to Complaint). The only actions alleged by such charges to constitute plaintiff's misconduct are set forth in the "Petition and Charges" (Appendix p. 32a) of defendants, extracted from the LIFE article of approximately 10,000 words, as follows:

> "5. It appears therefrom that said Martin Erdmann said of and concerning the courts within the First Judicial Department:

---

* Comprising New York and Bronx County.

'There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams.'

'I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price.' "

"6. The following language also appears in Exhibit A:

'Erdmann's disrespect for judges . . . is so strong and all-inclusive that it amounts at times to class hatred. . . . ' "

The complaint in this action and plaintiff's affidavit state that in or about March 1971 the defendant Justices presented a grievance concerning the article to the Grievance Committee of the City Bar Association, a body authorized by court rule to investigate, charge and hear allegations of professional misconduct. After investigation, the Committee through its Chairman declined to bring or recommend charges against plaintiff. Thereafter, in an act apparently unprecedented in the history of their court, the defendant Justices on June 8, 1971 initiated the Petition and Charges themselves.

The order to show cause annexed to the Petition and Charges provided that the matter would be transferred to an Appellate Division in another Department after the filing of an answer. The charges were thereafter transferred for adjudication to the Appellate Division, Third Department, sitting in Albany, although the only reference in the LIFE article and in the excerpt drawn from it in the

charges is to "Appellate Division Judges," not to the First Department. After the charges had been so transferred, the defendants rather than the Third Department issued an order appointing an attorney to prosecute the charges.

The prosecuting attorney moved for judgment without an evidentiary hearing and on June 27, 1972 the Appellate Division, Third Department, granted the motion without a hearing, finding plaintiff guilty of professional misconduct and censuring him, —— A.D.2d —— (Appendix p. 20a). The sole findings against plaintiff by the Appellate Division are as follows:

> We find that the intemperate, vulgar and insulting language contained in the statement quoted above and concededly used by respondent is an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system.
>
> Accordingly, we find respondent guilty of professional misconduct and sustain the petition and charges to the extent noted.

The present action was brought on September 24, 1971, following unsuccessful negotiations concerning settlement of the Petition and Charges and prior to transfer of the case to the Appellate Division, Third Department, in November of 1971 for adjudication. The complaint alleges that the charges by the defendants have the specific purpose and effect of depriving the plaintiff of First Amendment rights and of intending through both threatened punishment and the pendency of the charges to deter plaintiff and other attorneys from making constitutionally pro-

tected statements critical of the New York judiciary, and of thereby interfering with freedom of speech, the press and association.

The complaint further alleges denial of equal protection of the laws and of due process of law because the judges who prosecute and who will adjudicate the case are allegedly aggrieved and interested parties; because the charges, although patently unconstitutional, were brought by defendants without statutory or other authority; because plaintiff was singled out by defendants for such enforcement; and because the charges seek to discipline plaintiff not only for words but for his opinions and the opinions of the author of the LIFE article, over which plaintiff has no lawful control.

Plaintiff's motion for a preliminary injunction in this action was supported by his own affidavit showing the chilling effect of the charges and the extraordinary circumstances of irreparable injury in his law practice and his speech, together with the affidavits of James Vorenberg, Alan Dershowitz and Herman Schwartz, law professors who attested to the importance of plaintiff's views and the immediate and demonstrably chilling influence of the charges on legal education. Affidavits from fellow members of the Bar, Ramsey Clark, James Shellow and Legal Aid Lawyers James Vinci, Dorothy Cropper and Robert Levy were to a similar effect.

Defendants submitted no affidavits to dispute plaintiff's showing of extraordinary irreparable injury, including the undertaking of these charges by the defendants patently without constitutional authority after the Grievance Committee had refused to do so, and the fact that parties ag-

grieved and personally interested in the outcome would determine the proceedings. In the District Court the defendants responded with a bare motion to dismiss, thus allowing plaintiff's evidence to stand uncontradicted.

On October 1, 1971 the District Court denied plaintiff's motion for a preliminary injunction and granted defendant's motion to dismiss the complaint on the ground that defendants are not "persons" within 42 U.S.C. §1983 and are immune, and that no irreparable harm was shown (Appendix p. 17a). On April 12, 1972 the Circuit Court of Appeals held that defendants were "persons" within 42 U.S.C. §1983 but affirmed, stating that federal-state comity precluded exercise of federal jurisdiction (Appendix p. 1a). In affirming, the Circuit Court recognized plaintiff's "serious and weighty constitutional claims" (Appendix p. 12a).

REASONS FOR GRANTING THE WRIT

1.

The decision below has decided an important question of federal law which has not been, but should be, settled by this Court, and his misapplied principles set forth in decisions of this Court.

In this action the Circuit Court has refused federal intervention based on the doctrine of comity invoked in *Younger* v. *Harris,* 401 U.S. 37 (1971), and its companion cases. The Circuit Court held that the complaint in this action failed to set forth facts "establishing . . . the existence of ireparable injury . . . . The Appellate Division's institution of disciplinary proceedings against him . . .

falls far short of the *Dombrowski* type campaign of harassment and 'official lawlessness' described by the Supreme Court in *Younger* as the kind of exceptional or extraordinary circumstances warranting federal intervention" (Appendix pp. 9a-10a). The present action is essentially different from the *Younger* group of cases, because it involves no criminal proceeding, and does not attempt to interfere with the administration of any state statute. Apart from these obvious differences, which will be more fully explored below, the Circuit Court substantially misapplies the *Younger* holding and incorrectly deprives plaintiff of vital remedies under the Civil Rights Act of 1871 (42 U.S.C. §1983).

Special Circumstances

Unlike *Younger* v. *Harris, supra,* and *Samuels* v. *Mackell,* 401 U.S. 66 (1971), special circumstances of irreparable injury to plaintiff and other attorneys have been alleged and shown to exist in this action. In *Younger* the doctrine of comity, as a bar to federal equitable relief in pending state court proceedings, was expressly predicated upon state proceedings "brought in good faith," 401 U.S. at 48. The complaint sets forth an intent on the part of the defendants to discourage plaintiff's criticism of the New York judiciary and to exclude such critics from membership in the New York Bar by means of the disciplinary proceeding brought against plaintiff.

In addition, the defendants' method of pursuing the charges, as alleged in plaintiff's complaint, clearly demonstrates special circumstances. Based on the LIFE article, the defendants had first filed a complaint against plaintiff with the Grievance Committee of the City Bar Association, which is empowered by court rule and custom to investigate alleged misconduct, draw charges, conduct hearings, and

make recommendations upon their findings. See Rules, New York State Supreme Court, Appellate Division, First Department §603.12. The Grievance Committee investigated the defendants' complaint and declined to bring or recommend charges against the plaintiff, of which plaintiff was notified in writing by the Committee Chairman. Thereafter, the defendant Justices initiated their own charges against plaintiff. It was alleged to the District Court by plaintiff, and it stands undisputed, that the defendants' action in bringing such charges after the Grievance Committee had refused to act was unprecedented in the history of their court.

The reinstituting of a complaint under these unique circumstances amounts to repeated and selective prosecution for purposes of harassment, and constitutes an element of extraordinary circumstances within the meaning of *Younger* v. *Harris, supra.* In *Shaw* v. *Garrison,* 328 F. Supp. 390 (E.D. La. 1971), a federal court intervened to prevent harassment through repeated prosecution in a state court. Federal injunctive relief has also been granted against state proceedings brought selectively to harass an attorney. *Sobol* v. *Perez,* 289 F. Supp. 392 (E.D. La. 1968). In *Duncan* v. *Perez,* 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970) federal courts enjoined selective prosecution of a "de minimis" battery where the purpose of prosecution was to harass.

In *Younger* v. *Harris,* 401 U.S. 34, 53-54 (1971), a separate cause for federal intervention was stated in Justice Black's observation that:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown

even in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the *Buck* case, *supra,* we indicated:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. . . . "

While there is no statute involved in this case, the charges against plaintiff are parallel for these purposes. Plaintiff's words and opinions, as well as the author's opinions, which form the only basis of the charges, convey merely general, if robust, criticism of the New York judiciary, so obviously within the scope of First Amendment protection that no legitimate and reasonable expectation of ultimate success could exist in the prosecution of these charges. The court below, while refusing to intervene, nevertheless adverted to plaintiff's "serious and weighty constitutional claims" (Appendix p. 12a). See, e.g., *Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Thus the charges are not only ill-conceived but are "flagrantly and patently" unconstitutional "in every clause, sentence and paragraph," and federal intervention is warranted.

The Court recognized in *Younger* v. *Harris, supra,* that, "Other unusual situations calling for federal intervention might also arise . . . " (401 U.S. at 54). Plaintiff has alleged a situation of that magnitude arising from a conflict of interest on the part of his accusers, prosecutors and judges when that conflict exists in conjunction with patently unconstitutional charges.

The plaintiff's alleged words and opinions have offended the defendant Justices of the Appellate Division and they have brought the charges. Transfer of the charges from the First to the Third Judicial Department of the Appellate Division for adjudication was an illusory protection of the plaintiff because his quoted words plainly did not refer to a particular Department, although the charges incorrectly assumed they did. By definition the Appellate Division as a whole is interested as a matter of law in the outcome of the proceedings. A different interpretation defies ordinary reason. Furthermore, the First Department exercised control over the proceedings even after the transfer by appointing the prosecuting attorney.

Plaintiff has claimed in this federal action that he could not be judged by the Appellate Division, his accusers and complainants, in conformity with fundamental due process under the Fourteenth Amendment. *In re Murchison,* 349 U.S. 133 (1955). Moreover, the New York law mandates that: "A judge shall not sit as such in, or take part in the decision of . . . proceeding[s] . . . in which he is interested." N.Y. JUDICIARY LAW §14 (McKinney's 1968). It has been held since *Younger* v. *Harris, supra,* that a personal interest in the outcome of charges establishes "special circumstances" entitling a plaintiff, under 42 U.S.C. §1983, to federal intervention. *Shaw* v. *Garrison,* 328 F. Supp. 390 (E.D. La. 1971).

The Circuit Court disagreed with plaintiff's allegation that he would not receive a fair hearing in the Appellate Division. Ironically, plaintiff's fear of an unfair hearing has since been proven unduly optimistic, because the Appellate Division, Third Department, has, on the defendants' motion for judgment on the pleadings, already

found plaintiff guilty of misconduct without granting a hearing at all, —— A.D.2d —— (3rd Dep't, June 27, 1972) (Appendix p. 20a).

Plaintiff is now faced with the prospect of having to appeal the decision to the New York Court of Appeals, whose power of review as to matters of fact is narrowly limited to determining whether "some evidence" exists to affirm. N.Y. JUDICIARY LAW §90(8) (McKinney's 1968); *Matter of Goodman,* 199 N.Y. 143, 144 (1910). Even a remand to the Appellate Division for a hearing would once again create a record inherently infected by the conflict of interest already illustrated. That forum has already declared the plaintiff guilty based on its sole finding that: "the intemperate, vulgar and insulting language contained in the statement . . . is an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system" (Appendix p. 23a).

It is of no benefit to plaintiff to obtain review of his constitutional claims when the initial fact-finding process is inherently unfair. This Court said in *Speiser* v. *Randall,* 357 U.S. 513, 521 (1958):

> Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. *Dennis* v. *United States, supra, Whitney* v. *California, supra,* the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.

The "unusual situations" (401 U.S. at 54) in this case include charges that are unconstitutionally vague and overbroad, as evidenced by allegations of misconduct based only on general criticism of the judiciary, and bearing no discernible relationship to the disciplinary rules invoked by the charges. The vagueness of the decision finding plaintiff guilty of misconduct is in itself a measure of proof of the vagueness and overbreadth of the charges. Vagueness in this respect is especially injurious where affirmatively protected freedoms, such as those afforded by the First Amendment, are concerned. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961); *Zwickler* v. *Koota,* 389 U.S. 241 (1967).

Thus, the plaintiff has shown not merely an "incidental 'chilling effect,' " of these charges, as discussed in *Younger* (401 U.S. at 51) or merely a facial abridgment of First Amendment rights (401 U.S. at 53); in addition to the demonstrable chilling effect of these charges on plaintiff and other lawyers, he has alleged and illustrated irreparable injury "both great and immediate" (401 U.S. at 46) through a host of special circumstances intimately connected with his disciplinary proceeding.

Federal-State Comity

In *Younger* v. *Harris, supra,* the doctrine of comity was applied to "a criminal prosecution" pending in a state court (401 U.S. at 43). *Younger* concluded that federal equity jurisdiction generally must not interfere with state enforcement of criminal statutes designed to control "socially harmful conduct," although such laws might incidentally chill free speech (401 U.S. at 52).

In the present case no such abuse to the principle of comity would result from federal intervention. The plain-

tiff is not involved in a criminal proceeding and does not seek to interfere with enforcement of any state statute. There is no attempt to invade a state's control over "socially harmful conduct" as contemplated by criminal statutes aimed at hard-core activity. This case involves pure speech as the only "conduct" in question. The matter which the plaintiff seeks to enjoin is a bar proceeding aimed solely at his criticism, and which on its face flagrantly violates the Constitution. It is not comparable to a criminal prosecution, embracing statutory construction, which tends incidentally to chill First Amendment rights. The policy reasons for comity in *Younger* v. *Harris, supra,* and its companion cases, are absent in this action, and comity does not preclude federal intervention under its facts.

The court below likened the plaintiff's disciplinary matter to a criminal prosecution in applying comity under *Younger,* citing the hazard of punishment and loss of reputation in both proceedings as a basis of comparison. The Circuit Court also held that state courts should not be subject to federal intervention in bar proceedings.

The Circuit Court's reference to the hazards faced by an attorney in disciplinary proceedings, states a greater reason to favor federal jurisdiction under the Civil Rights Act (42 U.S.C. §1983) than to deny it under comity. Moreover, mere procedural comparisons between criminal and bar proceedings, if anything, accentuate the civil nature of the latter under New York law. For example, *In re Spencer,* 137 App. Div. 330, 334 (1st Dep't 1910), holds:

> . . . the regulations governing the trial of a criminal action or proceeding are not made applicable to a proceeding to disbar an attorney.

It is plain from the vagueness of the charges against Mr. Erdmann that he does not enjoy the rigorous protections of a criminal proceeding.

It is a misapprehension of the Civil Rights Act, *Younger,* and the doctrine of comity to hold that bar proceedings in a state court are exempt from federal intervention. This Court recently held that federal suits to enjoin state court proceedings under Section 1983 of the Civil Rights Act were intended by Congress as an exception to the anti-injunction statute (42 U.S.C. §2283) under which, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress . . . ." *Mitchum* v. *Foster,* 40 U.S.L.W. 4737 (U.S. June 19, 1972). Within the rules of equity, comity and federalism Section 1983 authorizes federal intervention "against state action, whether that action be executive, legislative, or *judicial*" (40 U.S.L.W. at 4741). Federal authority to intervene in a pending state bar proceeding therefore exists under 42 U.S.C. §1983 within the rules of comity.

In *Sobol* v. *Perez,* 289 F. Supp. 392 (E.D. La. 1968), comity did not bar federal intervention under Section 1983 on behalf of an attorney charged in a state criminal prosecution with unauthorized practice of law. State interests in the regulation of its bar were found to have been outweighed by a bad faith prosecution to harass the attorney.

Administrative Nature of the Proceeding

It is a substantial question in any case whether a state "judicial" proceeding was pending at all when the plaintiff commenced this action. In *Roudebush* v. *Hartke,* 92

Sup. Ct. 804 (1972), a state court ordered an election recount and appointed a recount commission after ruling on the recount petition and a motion to dismiss it. Employing the definition that a "judicial inquiry investigates, declares, and enforces liabilities . . .," this Court held that such limited acts were not a "court proceeding" or a "judicial function" in a suit under 42 U.S.C. §1983, but were rather an "administrative" function (92 Sup. Ct. at 808, 809).

In the present matter the defendant Justices likewise performed only an administrative function. Comity does not bar federal intervention when state authorities acting administratively abridge First Amendment rights. See, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd on other grounds*, 401 U.S. 154 (1971). First, the defendants took up the administrative role of the Grievance Committee after its refusal to act. They served an order to show cause and charges on plaintiff, *which contained a notice of defendants' intention to transfer the matter to another Judicial Department* (Appendix p. 30a). Only after this federal action had been brought and dismissed in the District Court did the defendants actually transfer the matter to the Third Department for adjudication. The defendants had therefore acknowledged their role as complainants rather than judges of the charges. As of the time this federal suit was brought and litigated in the District Court no "judicial inquiry" had yet occurred. The charges had not yet been transferred for adjudication, and no "court proceeding" existed within the definition of *Hartke*. See *Taylor* v. *Kentucky State Bar Association*, 424 F.2d 478, 482 (6th Cir. 1970), in which the court observed:

> . . . disbarment proceedings, prior to their adjudication in the court in which the power to disbar resides, are not 'proceedings in a State court,' therefore the federal anti-injunction statute does not apply.

In addition, the plaintiff could not reasonably have foreseen that after the original complaint was terminated by the Grievance Committee it would be revived by the defendants who, it appears, had never before done so. The remedy which Congress created in Section 1983, as an exception to the federal anti-injunction statute (*Mitchum* v. *Foster, supra*), could not have been meant to require "a race to the courthouse." *Sheridan* v. *Garrison,* 415 F. 2d 699, 706 (5th Cir. 1969).

This is not a bar proceeding of mixed federal and state questions such as comity might properly resist. This case is even stronger than *Taylor* v. *Kentucky State Bar Association, supra,* in which the Circuit Court held that a cause of action had been stated in the complaint of an attorney suing under 42 U.S.C. §1983 to enjoin a disciplinary proceeding which he alleged had been brought for purposes of harassment. The disciplinary charges in *Taylor* dealt partly with state practice provisions which did not on their face impinge on constitutional guarantees. On the other hand the charges against Mr. Erdmann violate his exercise of First Amendment rights "flagrantly and patently" on their face from beginning to end.

In summary, comity does not preempt federal equitable relief when state bar proceedings, as here, are brought on charges blatantly unconstitutional, by repeated complaint and prosecution, to harass members of the bar and stifle criticism of the judiciary, while state judges personally

interested in the outcome adjudicate the issues in the absence of a hearing. For the foregoing reasons the federal court had the power to intervene.

2.

The decision below raises important First Amendment issues broadly affecting the national bar.

The words of Mr. Erdmann were not uttered in or near a court, nor concerning any case. There is no way that they could be construed to constitute a "clear and present danger." See *Wood* v. *Georgia,* 370 U.S. 375, 386 (1962) (Press release by sheriff criticizing political intimidation by a judge); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946) (newspaper criticism of criminal justice).

In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964), a lawyer's First Amendment rights were held inviolable and the principle of that case is applicable to disciplinary proceedings. Before and since *Garrison,* the Supreme Court has repeatedly upheld the principle that one does not relinquish constitutional rights as a condition of membership in the bar. *Schware* v. *Board of Examiners,* 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (1957), dealt with applicants to the bar whose social and political beliefs had been found unsuitable on moral grounds by the state bar examiners. The Supreme Court held in *Schware* that due process had been violated. In *Konigsberg,* where the applicant had refused on First Amendment grounds to answer questions regarding his political affiliations, the Court sanctioned his right to do so, stating:

> It is important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an independent bar. 353 U.S. at 273.

No professional rule of conduct has survived a collision with constitutionally protected rights of attorneys. In *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963), the Court held unconstitutional the well-known rule against solicitation of clients by attorneys, where that regulation violated freedom of speech and association between particular attorneys and clients. The right of a lawyer to invoke the Fifth Amendment in state disciplinary proceedings was held paramount to a contrary state rule of professional conduct in *Spevak* v. *Klein*, 385 U.S. 511 (1967). See *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971), in which the Court held Arizona's refusal to admit an applicant to the bar a violation of his freedom of association. Unconstitutional state procedures in regard to admissions to the bar have recently been struck down also in *In re Stolar*, 401 U.S. 23 (1971); and see *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117 (S.D.N.Y. 1969), *aff'd on other grounds*, 401 U.S. 154 (1971). Both cases concerned First Amendment violations.

In the elections of November, 1972, the State of New York will fill several vacancies on the bench of its highest court. Other judicial elections and numerous appointments and reappointments will occur throughout this year and thereafter, as always. Shall lawyers be heard in the process of judicial selection or shall they abstain because their views may be deemed "an offense against the dignity and integrity of the courts" or may tend "to create disrespect

for judicial officers generally thereby lessening public confidence in our legal system"! (Opinion, Appellate Division, Third Department, Appendix p. 20a).

The plaintiff submits that his views and those of all attorneys are not only chilled but are effectively enjoined from any open expression by his disciplinary proceeding. The bar has been put on notice that strong criticism of the judiciary will be met with reprisals. The plaintiff contends that he, the bar generally and the causes of judicial administration are greatly, immediately and irreparably injured as a result of such injunction against their criticism. As long as this litigation lasts and until the plaintiff's rights are judicially vindicated, the injury abides. The plaintiff claims that "substantial loss or impairment of freedom of expression will occur if [he] . . . must await the state court's disposition and ultimate review in this Court of any adverse determination." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965).

Many judges and some attorneys who enjoy great power at the bar perhaps do not sense the plight of the average lawyer. As discussed below, the fact is that the great preponderance of attorneys fear the personal risk of assisting in law reform or judicial selection. They will openly discuss and criticize executive and legislative government, but not their judicial government, especially locally where the danger of reprisal is greatest. To the concerned lawyer the dilemma is utterly real and immediate. The plaintiff's disciplinary proceeding is a monument to those fears.

Legal writers and students of law reform confirm the problem. See Katz, *Some Call It Justice,* THE WASHINGTONIAN 46 (Sept. 1970), in which the author, a former trial

attorney for the U.S. Department of Justice, presents a study of biases and abuses of lower court judges in Washington, D. C. The author comments (at page 76):

> Lawyers know about judges. They want bad judges exposed and removed, but they don't want to be identified as critics of a particular judge or a particular court. None of the attorneys I interviewed for this article would allow me to use their names. They know that a vengeful judge can destroy an attorney and his clients.

Professor Herman Schwartz of the University of Buffalo Law School, a teacher of criminal law and an active court advocate, has written of the oppressive practices of some trial judges. Schwartz, *Judges as Tyrants,* 7 CRIM. LAW BULL. 129 (March 1971). He concludes that lawyers are generally afraid to discuss such matters openly (at page 132):

> None of this is particularly secret but few lawyers are willing to say such things publicly, no matter how discourteous, prejudiced, or otherwise unqualified a judge may be . . . One reason for this silence is that such criticism might jeopardize the lawyer's livelihood —after all, he must appear before these men and their hostility could seriously impair his effectiveness.

Alan M. Dershowitz, Professor of Law at Harvard University Law School, in his foreword to an article resulting from an exhaustive study of abuses in the lower courts of Boston, confirms the view that law reform presently is a dangerous pursuit for a lawyer. Bing & Rosenfeld, *The Quality of Justice: In the Lower Criminal Courts of Metropolitan Boston,* 7 CRIM. LAW BULL. 393 (June 1971).

In the District Court it was alleged and shown that the plaintiff personally supervises at least forty-eight other attorneys in all five counties of New York City, where he serves as Chief Attorney of the Supreme Court staff of The Legal Aid Society, Criminal Branch. His duties are to train and counsel the attorneys and to direct their representation of thousands of indigent clients, in addition to his personal representation of such clients. Public recognition of the plaintiff's vast experience and superb ability put him in constant demand as a legal educator, public speaker, and consultant in the administration of justice in the courts. The plaintiff alleges that he has been severely curtailed in all his work as a result of the proceeding to discipline him.

Affidavits were submitted in this action by the plaintiff's colleagues who attest to a loss of the plaintiff's uninhibited counsel as well as their own freedom of expression. Other affidavits of lawyers and law professors have shown the palpable chill of these disciplinary charges on legal practice and legal education.

The damage done by silencing a lawyer of Mr. Erdmann's caliber is great, immediate and irreparable. However, the very pendency of these proceedings is disastrous in its effects on the bar generally who, as seen, already regard their participation in the crucial, ongoing processes of law reform as unwelcome and professionally dangerous. Federal courts should intervene when the very pendency of a state proceeding to punish an individual "would constitute an unmistakable message" which inhibits reliance on federal rights by a sizeable segment of the community. *Duncan* v. *Perez,* 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970).

Justice Robert H. Jackson observed:

> The lawyers are the only group in the community who really know how well judicial work is being done. The public may rightfully look to them to be the first to condemn practices or tendencies which they see departing from the best judicial traditions. [38 J. Am. Jud. Soc'y 96 (1954).]

In Drinker's work on Legal Ethics, Chief Justice George Sharswood, author of our modern theory of legal ethics, declared:

> No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. . . . To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system. [Quoted in Drinker, Legal Ethics 71 (1953).]

These crucial functions of lawyers cannot wait to be vindicated only after lengthy appeals of state disciplinary proceedings, brought to stifle criticism. Chief Justice Sharswood would have held this "a position too monstrous to be entertained for a moment. . . ." The federal court should intervene in this case to halt further injury to the plaintiff, the bar, and the administration of justice.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

WILLIAM LEIBOVITZ
ELLIS STRINGFELLOW PATTON & LEIBOVITZ
51 East 42nd Street
New York, New York 10017

PAUL G. CHEVIGNY
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorneys for Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 495—September Term, 1971.

(Argued February 25, 1972 Decided April 12, 1972.)

Docket No. 71-2014

MARTIN ERDMANN,

Plaintiff-Appellant,

—against—

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPFERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as Clerk of the said Appellate Division,

Defendants-Appellees.

Before:

LUMBARD, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* denying preliminary injunctive relief and dismissing a complaint for lack of jurisdiction in a suit by a New York attorney seeking to enjoin the conduct of disciplinary pro-

ceedings against him by members of the Appellate Division, First Department, of the State of New York.

Affirmed.

PAUL G. CHEVIGNY, New York, N.Y. (William Leibovitz, Ellis Stringfellow Patton & Leibovitz, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

DANIEL M. COHEN, Assistant Attorney General, New York, N.Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, New York, N.Y., on the brief), *for Defendants-Appellees.*

MANSFIELD, *Circuit Judge:*

In this action by Martin Erdmann, a New York attorney, against members of the Appellate Division, First Department, State of New York, seeking declaratory and injunctive relief against disciplinary proceedings instituted by them against him on the ground that the proceedings violate his constitutional rights, he appeals from denial of preliminary injunctive relief and dismissal of his complaint. Federal jurisdiction is invoked pursuant to Title 28 U.S.C. §§1343 and 2201, *et seq.*, and the federal Civil Rights Act, Title 42 U.S.C. §§1983 and 1985. We affirm.

On June 8, 1971 the Justices of the Appellate Division, First Department, State of New York, served upon Erdmann, a practicing member of the New York bar and trial attorney in charge of all criminal matters for the Legal Aid Society before the State Supreme Courts of the five counties of New York City, a petition and order to show cause charging him with violation of several of the pre-

cepts of the Code of Professional Responsibility, New York Judiciary Law Appendix (McKinney Supp. 1971) and of the Canons of Professional Ethics, New York Judiciary Law Appendix (McKinney 1968). The charges were based upon portions of an article of approximately 10,000 words about Mr. Erdmann entitled "I Have Nothing to Do with Justice," which appeared in the March 12, 1971 issue of *Life* magazine. Erdmann's alleged unethical conduct was specified to be his assertion to the author of the article that:

> "There are so few trial judges who just judge, . . . who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams.
>
> "I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price."

He was also cited for a breach of ethics for characterization of him by the author of the article as follows:

> "Erdmann's disrespect for judges . . . is so strong and all-inclusive that it amounts at times to class hatred. . . ."

On September 24, 1971, Erdmann instituted an action in the United States District Court for the Southern District of New York against each of the justices and the clerk of the Appellate Division, First Department. The complaint and accompanying affidavits filed in support of Erdmann's application for preliminary injunctive relief allege upon information and belief that in March 1971 the Justices of the Appellate Division, First Department, filed a grievance with the Committee on Grievances of the Association of

the Bar of the City of New York grounded upon the alleged impropriety of the above comments and reported attitude, that the Committee decided that no disciplinary action should be taken and so informed Erdmann on April 30, 1971, and that despite this recommendation the Justices in June 1971 instituted the disciplinary proceedings against Erdmann now pending. Erdmann further alleges that the proceeding was brought by the Justices with the specific purpose of discouraging and preventing his exercise of his First Amendment rights, depriving him of freedom of access to the press, denying him the right to petition for redress of grievances, and in violation of his Fourteenth Amendment rights of equal protection and due process of law. He avers that he is being irreparably injured in that the charges have deterred him and other lawyers from criticizing the judiciary and have prevented him from candidly advising his subordinates as to the realities of state trial practice. His motion for preliminary injunctive relief was supported by affidavits of several lawyers and law professors emphasizing the public interest in permitting full and frank criticism of the judiciary by members of the bar.

In denying appellant's motion for a preliminary injunction and dismissing the complaint for lack of jurisdiction,[1] Judge Ryan relied upon the decision of this Circuit in *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970), which held that a civil rights action could not be maintained against the Appellate Division as a body, since it is not a "person" within the meaning of 42 U.S.C. §1983. Where (as here) the Justices and the Clerk of the Appellate Division have been sued as individuals, however, we are persuaded by the reasoning of our brother, Chief Judge

1 Defendants also moved to dismiss the complaint for failure to state a claim entitling Erdmann to relief, Rule 12(b)(6), F.R.Civ.P., which the district court did not decide in view of its dismissal of the action for lack of jurisdiction.

Friendly, expressed in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (three-judge court), *aff'd. on other grounds*, 401 U.S. 154 (1971), that no sound reason exists for holding that federal courts should not have the power to issue injunctive relief against the commission of acts in violation of a plaintiff's civil rights by state judges acting in their official capacity. Accordingly, we conclude that jurisdiction exists and proceed to the merits.

The principal issue is whether, in view of the policy expressed by the Supreme Court recently in the sextet of cases headed by *Younger* v. *Harris*, 401 U.S. 37 (1971),[2] Erdmann's complaint and supporting papers state facts entitling him to injunctive relief. In *Younger* the Supreme Court denied federal injunctive relief against a pending state criminal prosecution and held that because of the strong policy in favor of "the notion of 'comity,' that is, a proper respect for state functions" and the Constitution's creation of a system in which the sensitivity of both state and federal courts must be recognized and balanced, such intervention should be permitted only under extraordinary circumstances, such as where the state proceedings have been instituted or prosecuted in bad faith or as part of a campaign of harassment which, unless restrained, would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised. See, e.g., *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). In thus reaffirming the long-established policy against federal intervention, see *Stefanelli* v. *Minard*, 342 U.S. 117 (1951); *Cleary* v. *Bolger*, 371 U.S. 392 (1963), it was recognized

---

2 The others are: *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

that unless intervention were severely restricted, alert counsel would resort to federal relief as a readily available means of disrupting or subverting legitimate state prosecutions in which constitutional issues could be resolved by competent state trial and appellate tribunals.

Erdmann seeks to avoid application of the foregoing principles on several grounds. First he argues that the Appellate Division's proceeding against him is administrative rather than judicial in nature. We disagree. Although a state court may perform non-judicial functions, see *Roudebush* v. *Hartke*, —— U.S. ——, 40 U.S.L.W. 4171 (Feb. 23, 1972), its conduct of disciplinary proceedings with respect to those admitted to practice before it amounts to a judicial inquiry.[3] The court alone admits an applicant to practice before it. Thereupon he becomes an officer of the court. The power to discipline, like the power to admit an applicant to membership of the bar, rests exclusively with the court. *Theard* v. *United States*, 354 U.S. 278 (1957); *People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465 (1928). The nature of the relationship between the court and attorneys admitted to practice before it was summarized by Justice Frankfurter, speaking for a unanimous court in *Theard:*

> "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The Court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals.

---

3 A "judicial inquiry" has been defined by the Supreme Court as one in which the court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *Roudebush* v. *Hartke*, —— U.S. ——, 40 U.S.L.W. 4171, 4173.

'"Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss*, [221 N.Y. 81, 84, 116 N.E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489." (354 U.S. 278, 281)

Under §90(2) of the New York Judiciary Law (McKinney 1968)[4] the Appellate Division of each judicial department in the state is given the exclusive power to resolve issues as to alleged misconduct of attorneys practicing within its jurisdiction. To implement this power it is vested with authority to hold a hearing to determine the facts of the alleged misconduct and to apply to them the relevant standards of conduct laid down in the Code of Professional Responsibility. Although the court, for practical reasons, invokes the assistance of bar associations and their committees to investigate and conduct hearings with respect to complaints regarding members of the bar, just as a federal court may employ special masters to hear and report, Rule 53, F.R.Civ.P., the disciplinary power continues to rest exclusively with the court. Indeed, in the First Department if the Grievance Committee of the Bar Association of the City of New York recommends disci-

---

4 New York Judiciary Law §90, subdivision 2, provides, in part:

"The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; . . . ."

plinary action, it refers the matter to the Appellate Division, which then holds a trial *de novo* before any disciplinary action may be taken. See Niles and Kay, *Spevack* v. *Klein: Milestone or Millstone in Bar Discipline?* 53 A.B.A.J. 1121, 1124 n.23 (Dec. 1967). Accordingly, we find that the Appellate Division, First Department, is acting in its judicial capacity as a state court in the disciplinary proceedings here at issue, and that these proceedings are judicial, not administrative, in nature.

Although it is an open question whether the principles of *Younger,* which involved a state criminal prosecution, apply with equal force to a civil suit, we need not face that issue here for the reason that in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding. A lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See *Bradley* v. *Fisher,* 80 U.S. [13 Wall.] 335, 355 (1872); *Spevack* v. *Klein,* 385 U.S. 511, 516 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being "of a quasi-criminal nature," *In Re Ruffalo,* 390 U.S. 544, 551 (1968).

Thus, while "the power of the States to control the practice of law cannot be exercised so as to abrogate federally

protected rights," *Johnson* v. *Avery*, 393 U.S. 483, 490 n.11 (1969), we see no sound reason for exempting a pending state court disciplinary proceeding from the principles of federal-state comity underlying *Younger* and its companion cases. The issue before us is not merely the constitutionality of a state court's action in a suit between third parties but its application of standards established by it for observance by its own officers. Although a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511 (1967), state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers. See, *e.g.*, *Law Students Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971), decided the same day as *Younger*.

The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness.

The conclusory charges of Erdmann's complaint and supporting papers fail to set forth facts establishing any likelihood of success on the merits or the existence of irreparable injury, which must be shown before injunctive relief may issue. *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Clairol Inc.* v. *Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968). The Appellate Division's institution of disciplinary pro-

ceedings against him admittedly represents the exercise of a function exclusively vested in it and falls far short of the *Dombrowski*-type campaign of harassment and "official lawlessness" described by the Supreme Court in *Younger* as the kind of exceptional or extraordinary circumstances warranting federal intervention. Furthermore, there is an absence of any evidence of irreparable injury of the type warranting relief under *Younger,* which requires proof of injury substantially in excess of that normally considered sufficient to invoke equitable relief. In noting that to justify federal relief against a state prosecution the injury must be "both great and immediate," Justice Black there stated:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, *the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.*" *Younger* v. *Harris,* 401 U.S. at 46 (emphasis added).

The injury alleged here is no more than that incidental to any single prosecution of a quasi-criminal nature. There is no reason to assume that Erdmann's constitutional rights will not be protected by the Appellate Division, Third Department, to which the disciplinary proceedings against him have been transferred for adjudication, or, if further review becomes necessary, by the New York Court of Appeals. The competency of New York state courts to decide questions arising under the federal Constitution, by which we are all governed, is beyond question. In the unlikely event that both of these state appellate courts apply improper standards, Erdmann could seek Supreme Court review by petition for writ of certiorari. Undoubtedly because of general recognition of the advisability of permit-

ting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. See, e.g., *Schware* v. *Board of Examiners*, 353 U.S. 232 (1957); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957); *Spevack* v. *Klein, supra; Matter of Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963).

We must reject as frivolous Erdmann's contention that despite the transfer by the Appellate Division, First Department, of the proceedings against him to the Appellate Division, Third Department (sitting in Albany) for adjudication, he will not be able to obtain a fair hearing because the opprobrious characterization of the state court justices attributed to him in the *Life* article applied to judges of all of the state's appellate divisions. One should not be permitted to escape a court's jurisdiction merely by labelling all of its judges "whores" or "madams." Furthermore, a fair reading of the *Life* article satisfies us that the above-quoted reference was only to justices of the Appellate Divisions within New York City, which was the setting of the events related by Erdmann to the author and is the area in which Erdmann functions as trial attorney in charge of criminal cases for the Legal Aid Society. We fail to perceive any vestige of support for his contention that the Third Department will not be able to act fairly and impartially. Furthermore, as we have noted, any adverse decision by it would be subject to review by the New York Court of Appeals, no member of which is included in the remarks attributed to Erdmann in the *Life* article.

Erdmann's claim that review by the New York Court of Appeals would be inadequate because that court will

neither revise punishment nor reverse the findings of an Appellate Division in a disciplinary proceeding unless the conduct condemned by it is "wholly blameless," *Matter of Flannery*, 212 N.Y. 610, 611 (1914), must also be rejected. The basis of his federal suit is not a denial that he made the statements attributed to him but that the statements constitute criticisms of the judiciary which are absolutely privileged under the First Amendment. See, e.g., *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). If the proceeding against Erdmann should not be dismissed by the Appellate Division, Third Department, for failure to prove that his alleged conduct violated a Disciplinary Rule, his serious and weighty constitutional claims must be considered by it, and, if necessary, by the New York Court of Appeals. In reviewing disciplinary proceedings on questions of law, the New York Court of Appeals is not, and constitutionally could not be, as limited as it is with respect to questions of fact. It may not uphold a finding of misconduct on the part of an attorney unless it concludes that "no substantial legal right of the accused has been violated". *Matter of Goodman*, 199 N.Y. 143, 144 (1910). Erdmann's important constitutional claims would therefore be assured of review, if necessary, by the New York Court of Appeals.

In view of Erdmann's failure to state facts entitling him to federal intervention, his complaint was properly dismissed, although for insufficiency rather than lack of jurisdiction. *Rialto Theatre Co.* v. *City of Wilmington*, 440 F.2d 1326 (3d Cir. 1971); *Turco* v. *Allen*, 334 F. Supp. 209, 219 (D. Md. 1971); *Sandquist* v. *Pitchess*, 332 F. Supp. 171, 180 (C.D. Cal. 1971) (three-judge court). Accordingly the district court's judgment is affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur in the majority opinion.

The relationship between state and federal courts has always been a delicate one; maintaining the appropriate balance between the dual sovereignties existing under our constitutional system is difficult at best. Overlapping jurisdictions between state and federal courts contribute to potential difficulties and this is particularly true when a proceeding in one court system is alleged to infringe rights susceptible of vindication in the other. To minimize the potential for conflict between the state and federal systems, federal court jurisdiction has been intentionally limited.[1]

Only last Term, the Supreme Court reaffirmed the vitality of the comity doctrine, which commands federal court restraint in the face of state proceedings in progress. In a series of cases dealing with pending state criminal prosecutions, the Court held that, barring exceptional circumstances, federal courts should not enjoin such proceedings.[2] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971). The Court specifically noted that the mere existence of a "chilling effect [on First Amendment freedoms] should not by itself justify federal intervention." *Younger* v. *Harris, supra*, 401 U.S. at 50. "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid con-

---

1 E.g., U.S. Const. art III; U.S. Const. amend. XI; 28 U.S.C. §1341-42, 2281, 2283-84; *Younger* v. *Harris*, 401 U.S. 37 (1971); *Railroad Comm'n* v. *Pullman*, 312 U.S. 496 (1941); *Ex Parte Royall*, 117 U.S. 241 (1886), codified at 28 U.S.C. §2254.

2 In the context of a pending state proceeding, declaratory relief would be as disruptive as injunctive relief and neither is here warranted. See *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

viction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Perez* v. *Ledesma, supra,* 401 U.S. 85. "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution could not themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Younger* v. *Harris, supra,* 401 U.S. at 46.

While these principles were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar. The state "has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law." *Baird* v. *Arizona,* 401 U.S. 1, 7 (1971). Indeed the state's responsibility in these matters is primary. A lawyer to practice anywhere in the United States must first be admitted to the bar of one of the states. In New York, as in all of the states, the proper functioning of its judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional responsibility. Thus, when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the state and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings.[3]

---

3 Erdmann's argument that this is an administrative, not judicial, proceeding is thus wide of the mark. While such inquiry is relevant to the question of the applicability of the federal Anti-Injunctive Statute, 28 U.S.C. 2283, which bars injunctions only in "proceedings in a State

Erdmann urges that the presumption against federal court intervention has been overcome by his allegation of "bad faith" in the initiation of the state disciplinary proceeding. However, his complaint merely alleges that the initiation of the disciplinary proceedings has "the specific purpose and the effect of depriving plaintiff of his right[s] . . . under the First Amendment. . . ." In his supporting affidavit, he alleges no more than that "it is unique for the Appellate Division to overrule" its Grievance Committee and that the pendency of the proceeding "harass[es], discourage[s] and prevent[s]" him from exercising his First Amendment rights. These allegations do not reach the level of "bad faith" warranting federal intervention. It is the judges and not the Grievance Committee who have the responsibility for deciding whether to begin disciplinary proceedings. N.Y. Jud. Law §90. The allegation that the judges have acted with the intention of chilling Erdmann in the exercise of his First Amendment rights can be presented and adjudicated in the state courts, with appeal to the Supreme Court. Only were it abundantly clear that Erdmann had been subjected to multiple prosecution or continued harassment or action under a patently unconstitutional statute would federal injunctive relief be available. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Younger* v. *Harris, supra,* 401 U.S. at 53-55.[4]

Erdmann, additionally, has completely failed to allege irreparable injury sufficient to any equitable relief. Nothing could be clearer from the Court's opinion in *Younger* v. *Harris* that the chilling of First Amendment rights "should

---

court," withholding of relief on grounds of comity demands an analysis of the state and federal interests involved and not mere labeling of a proceeding as "administrative" or "judicial."

4 For a discussion of bad faith enforcement warranting federal intervention, see Note, The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 314 (1971).

not by itself justify federal intervention" 401 U.S. at 50, and that it does not constitute irreparable injury "in the special legal sense of that term." 401 U.S. at 46. As this is his only allegation of irreparable injury and as his claim is susceptible of adjudication in the state court, he is not entitled to injunctive relief and the complaint should be dismissed.[5]

---

5 The district court dismissed the complaint erroneously relying on this court's decision in *Zuckerman* v. *Appellate Division*, 421 F.2d 625 (2d Cir. 1970). Erdmann brought this action against the judges and clerk of the First Department as individuals, thus bypassing the strictures of the Eleventh Amendment, see *Ex Parte Young*, 209 U.S. 123 (1908); *Monroe* v. *Pape*, 365 U.S. 167 (1961). And, as Judge Friendly demonstrated in *Law Students Civil Rights Research Council* v. *Wadmond*, 299 F.Supp. 117 (S.D.N.Y. 1969), *aff'd on other grounds*, 401 U.S. 154 (1971), state judges need no immunity against federal civil rights suits seeking injunctive relief. The complaint should be dismissed, however, as Erdmann has failed to make allegations sufficient to warrant federal injunctive relief.

Opinion of the United States District Court, Southern District of New York

MARTIN ERDMANN v. HAROLD A. STEVENS, et al.

Endorsement and Order

71 Civ. 4214

Plaintiff's motion is denied; defendants' motion to dismiss the complaint on the merits is granted.

Plaintiff moves to enjoin the Justices and the Clerk of the Appellate Division, First Department, New York Supreme Court, from conducting disciplinary proceedings against him under the New York Judiciary Law, Sec. 90 (2), alleging infringement of his First Amendment rights of freedom of speech, freedom of press, freedom of association, and equal protection of the laws and due process, and causing him irreparable injury in his profession in violation of Section 1983 U.S.C.A. Title 42.

The complaint alleges that plaintiff is an attorney employed by the Legal Aid Society of New York, Criminal Branch, and is in charge of supervising the work of 48 staff attorneys; that, as a result of a statement attributed to him appearing in Life Magazine, in which he referred to the Judges of the Appellate Division, First Department as "whores, who became madams" and generally to judges as being in politics or buying their appointments, he has been directed to answer charges of violation of professional ethics before the Appellate Division, First Department. Upon his answering the charges in the petition of the Appellate Division, he has been notified that the proceedings will be transferred to another Department of the Appellate Division for hearing and determination. The

irreparable harm complained of is that, by reason of his fear of further expressing himself concerning the judiciary, he is unable to counsel his clients, his attorneys, and to express his opinion as to the qualification of judges seeking reelection or reappointment, or to lecture and write about the state of criminal justice.

I conclude that the complaint must be dismissed for the following reasons. The Court lacks jurisdiction over defendants who, although named individually, are the Appellate Division, First Department. No claim is made against any judge or the clerk individually. It is clear from the complaint that the claims alleged against them arise from their official action as a judicial body in the exercise of their powers and duties under the Judiciary Law as a part of the Judicial System of the State of New York (*Zuckerman* v. *Appellate Division, Second Dept.*, 421 F. 2d 625 (2nd Cir., 1970)). Plaintiff's naming of the judges individually is an obvious maneuver to avoid the holding of *Zuckerman*. It would be ridiculous to support jurisdiction on such a technicality. Since the action complained of is taken by the judges in their official capacity, they are immune from suit to the same extent as when they are deciding a case in a judicial proceeding. Under the Judiciary Law, the jurisdiction of the Appellate Division is exclusive and controlling. This Court has no jurisdiction under Title 42 U.S.C.A. Section 1984.

The statutory authority granted the defendants under the New York Judiciary Law over members of their State bar should not be interfered with by the federal judiciary. Certainly, any claim of Constitutional right can and will be aired throughout the proceedings to the highest State court (*Theard* v. *United States*, 354 U.S. 278; *Spivack* v. *Klein*, 385 U.S. 15).

Plaintiff has totally failed to show any harm. His unjustified fear of counseling defendants and his staff attorneys and of engaging in all the other activities enumerated, is not a result of the charges brought against him. The unprofessional conduct charged to him which forms the basis of the petition, has nothing to do with the proper performance of his professional duties—quite the contrary is so.

The complaint is dismissed; plaintiff's motion falls as a consequence. The Clerk is directed to enter forthwith judgment of dismissal for lack of jurisdiction.

So ordered.

SYLVESTER J. RYAN
U.S.D.J.

Dated: October 1, 1971.

JUDGMENT ENTERED 10/4/71
JOHN LIVINGSTON
Clerk

Majority Opinion of the Appellate Division, Third Department

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of THE JUSTICES OF THE APPELLATE DIVISION, FIRST DEPARTMENT,

Petitioners,

—against—

MARTIN ERDMANN,

Respondent.

Submitted, May 15, 1972.

Before:

HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. ELLIS J. STALEY, JR.,
HON. LOUIS M. GREENBLOTT,
HON. RICHARD D. SIMONS,
HON. WALTER B. REYNOLDS,
Associate Justices.

Disciplinary proceedings instituted by the Justices of the Appellate Division, First Judicial Department. Respondent was admitted to the Bar on March 11, 1940, at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

DANIEL M. SHIENTAG, for petitioners, 14 Vesey Street, New York, New York 10007.

ELLIS, STRINGFELLOW, PATTON & LEIBOVITZ (William Leibovitz, of counsel), for respondent, 51 East 42 Street, New York, New York 10017.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Amicus Curiae, 42 West 44 Street, New York, New York 10036.

OPINION FOR CENSURE

PER CURIAM:

In this proceeding to discipline an attorney, which proceeding was instituted in the Appellate Division, First Department, and subsequently transferred to this court, petitioners move for an order sustaining the petition and charges to the extent of finding respondent guilty of professional misconduct. Respondent cross-moves for orders 1) dismissing the petition and charges as being inadequate as a matter of law to sustain the alleged violations; 2) disqualifying the justices of all departments of the Appellate Division from adjudicating this proceeding on the ground that all Appellate Division justices are "interested" in the proceeding; and 3) opening and making public all prior and future proceedings in this matter. Petitioners' motion for an order sustaining the petition and charges is premised on the ground that the charges arise out of conduct on the part of respondent as to which there is no

material factual dispute so that the matter can be determined on the pleadings, exhibits and papers presently before the court.

The charges of professional misconduct against respondent arose as the result of the publication of an article entitled "I Have Nothing to Do with Justice", which appeared in the March 12, 1971 issue of LIFE magazine. The petition alleges that, according to the article, respondent's attitude towards judges is one of disrespect "so strong and all-inclusive that it amounts at times to class hatred". Although the entire article is referred to by reference, the offending language, alleged to have been said of and concerning the courts in the First Judicial Department, appears in paragraph 5 as follows:

> "There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams."
>
> "I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price."

While respondent's statements and the language used in the article are alleged to be violative of enumerated sections of the Canons of Professional Ethics and Code of Professional Responsibility, the justices additionally accuse respondent, by his use of unrestrained and intemperate language, of lessening public confidence in our legal system and of failing to uphold the dignity of the judiciary.

The courts have frequently recognized that an attorney, both as an officer of the court and a citizen, has a right to criticize the acts of courts and judges, but this does not mean that an attorney may indulge in unfounded and intemperate criticism, insulting language or abuse. (See 12 ALR 3d 1408.) In *Matter of Bevans,* 225 App. Div. 427, we said the following (p. 431):

> Judicial officers . . . are not immune from suit or criticism; but, like every one else, they are protected against scandalous charges. To make a public, false and malicious attack on a judicial officer is more than an offense against him individually; it is an offense against the dignity and integrity of the courts and of our judicial system. It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges. It tends to impair the respect and authority of the court. In this and in other jurisdictions, the rule is well settled that an attorney who engages in making false, scandalous or other improper attacks upon a judicial officer is subject to discipline.

We find that the intemperate, vulgar and insulting language contained in the statement quoted above and concededly used by respondent is an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system.

Accordingly, we find respondent guilty of professional misconduct and sustain the petition and charges to the extent noted. Respondent's cross motion, insofar as it seeks an order opening and making public all prior and

future proceedings in this matter, is granted. In all other respects, the cross motion is denied. Under all the circumstances, we are of the opinion that censure is the appropriate measure of discipline.

We take pains to point out, however, that nothing contained in this opinion should be interpreted as an attempt by this Court to stifle criticism by members of the bar of the courts or the judicial system, recognizing, as did Chief Justice Sharswood of the Supreme Court of Pennsylvania almost a century ago, that

> "No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a court house, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system." [*Ex parte Steinman,* 95 Pa. 220, 238-239.]

Respondent is censured.

Dissenting Opinion of Greenblott, *J.S.C.*

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of THE JUSTICES OF THE APPELLATE DIVISION, FIRST DEPARTMENT,

Petitioners,

—against—

MARTIN ERDMANN,

Respondent.

(GREENBLOTT, *J.*, dissenting.)

The petition instituted by the Justices of the Appellate Division, First Department, specifically charges that respondent violated Disciplinary Rules 1-102, 1-103 (B), 2-101 (A) and (B), and 8-102 (A) and (B) and Ethical Considerations 1-5, 8-6, and 9-2 of the Code of Professional Responsibility of the American Bar Association, adopted without change by the New York State Bar Association, and Canon 1 of the Canons of Professional Ethics.

The majority has found respondent guilty of using "intemperate, vulgar and insulting language" which they consider to be "an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system." They have therefore decided to censure

respondent. From an analysis of their language I can only conclude that they have found respondent innocent of all charges of having violated Disciplinary Rules. With this I agree. However, they have apparently censured respondent as a result of their conclusion that he is guilty of a violation of an Ethical Consideration. With this I cannot agree.

Ethical Considerations cannot result in censure as, unlike the Disciplinary Rules, they are aspirational in character rather than mandatory (see Preliminary Statement to the Code of Professional Responsibility). This is even recognized by petitioners whose reply concedes that Ethical Considerations are merely guidelines. Since Ethical Considerations are not in and of themselves mandatory rules, the findings of the majority should not be the basis for formal disciplinary action as is here being taken.

There are many other aspects of this case which militate against the result reached by the majority. The Grievance Committee of the Association of the Bar of the City of New York, which had recommended after their initial investigation that formal disciplinary action not be taken against respondent, has filed a memorandum in respondent's behalf. It states, in part, that respondent, "in a letter to the editors of the magazine in question (not published), and on other occasions disavowed any intention to attribute venality or personal dishonesty to members of the judiciary and he has expressed regret that his 'looseness of speech' lent itself to such interpretation." These attempts by respondent to take corrective action should be favorably considered by this court in evaluating respondent's conduct.

The majority's opinion is directed at the following quotation:

"There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams."

"I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price."

The metaphor referring to the elevation in status of Appellate Division Justices is clearly a figure of speech and although the language was colorful, cannot possibly be taken literally as an accusation. A lawyer should not be punished solely on the basis of intemperate remarks especially when these remarks deal with matters of broad current public concern which have been widely discussed in newspapers, magazines and professional journals. Respondent, as a Public Defender who has practiced for years in a contentious and frustrating field of the law, was qualified to make some comment about the status of the criminal court system in New York City and was, in fact, directed to do so by his superior. In addition, the article's criticisms were not directed at any individual.

Finally, there is another aspect to this matter which troubles me deeply. Overshadowing all else are serious and weighty constitutional questions (see *Erdmann* v. *Stevens*, —— F.2d —— [2d Cir., April 12, 1972], slip op. p. 2638). Certainly it cannot be doubted that a citizen has the right under the First and Fourteenth Amendments of the United States Constitution and article I of the New York State Constitution to criticize the judiciary or any other branch of our State or Federal governments. Although a member

of the bar must maintain the highest standards of ethical conduct in fulfilling his professional responsibilities (see *Matter of Baker,* 28 N Y 2d 977, affg. 34 A D 2d 229), he should not be forced to surrender his valuable constitutional rights.

For the reasons enumerated above, I respectfully dissent. The petition should, in my opinion, be dismissed.

HERLIHY, *P.J.*, STALEY, JR. and REYNOLDS, *JJ.*, concur. GREENBLOTT and SIMONS, *JJ.*, dissent and vote to dismiss in an opinion by GREENBLOTT, *J.*

Order to Show Cause and Petition and Charges of the Justices of the Appellate Division, First Judicial Department, Supreme Court of the State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of
THE JUSTICES OF THE APPELLATE DIVISION,
FIRST DEPARTMENT,

Petitioners,

—v.—

MARTIN ERDMANN,

Respondent.

ORDER TO SHOW CAUSE

On the annexed petition and charges verified the 8th day of June, 1971, let the respondent show cause before this Court at the Appellate Division Court House, in the County of New York, on the 30th day of June, 1971, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why the respondent should not be disciplined as provided in Judiciary Law Section 90(2), and why the said Court should not take such action therein as in the judgment of said Court justice may require.

This proceeding will not appear on the regular printed calendar of the Court but will be called in the same manner as if it had so appeared. Section 90(10)—Judiciary Law.

Respondent shall file with the Clerk of this Court his answer and other papers, if any, which he intends to submit to the Court in opposition to this application on or before the 30th day of June, 1971.

Six copies of all papers submitted in connection with this proceeding should be filed with the Clerk of the Court.

After the filing of answer, this proceeding will be transferred to an Appellate Division in another Department.

Dated: New York, N. Y.
8th day of June, 1971.

By direction of the Court:

HYMAN W. GAMSO
Clerk of the Court

SUPREME COURT
OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of

THE JUSTICES OF THE APPELLATE DIVISION,
FIRST DEPARTMENT,

Petitioners,

—v.—

MARTIN ERDMANN,

Respondent.

PETITION AND CHARGES

The Justices of the Appellate Division, First Department, allege and charge as follows:

1. Respondent was admitted to practice as an attorney and counselor-at-law on March 11, 1940 at a term of the Appellate Division of the Supreme Court, First Department, held in the County of New York.

2. It has come to our attention that respondent aided and cooperated in the preparation and acquiesced in the publication of an article entitled "I have nothing to do with Justice" by James Mills, in the March 12, 1971 issue of LIFE magazine.

3. As a result of certain aspects thereof, in causing and aiding publication thereof, respondent is guilty of

professional misconduct within the meaning of Judiciary Law Section 90(2) and in violation of the Code of Professional Responsibility adopted by the New York State Bar Association, effective January 1, 1970, and the Canons of Professional Ethics, adopted by the New York State Bar Association, as amended to March 1, 1968, hereinafter set forth.

4. Annexed hereto as Exhibit A is a true copy of said article published as aforesaid.

5. It appears therefrom that said Martin Erdmann said of and concerning the courts within the First Judicial Department:

"There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams."

"I would like to [be a judge] just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it—and I don't even know the going price."

6. The following language also appears in Exhibit A:

"Erdmann's disrespect for judges * * * is so strong and all-inclusive that it amounts at times to class hatred * * *"

7. That the said statements of Martin Erdmann and the language used in the said article evidence and involve violation of DR 1-102, DR 1-103(B), DR 2-101(A) and

(B), DR 8-102(A) and (B), Ethical Considerations 1-5, Ethical Considerations 8-6 and Ethical Considerations 9-2 of the Code of Professional Responsibility of the American Bar Association, adopted, without change, by the New York State Bar Association effective January 1, 1971, and Canon 1 of the Canons of Professional Ethics, copies of which are hereto annexed as Exhibits B1 to B8.

8. Use of unrestrained and intemperate statements tend to lessen public confidence in our legal system; the aid and cooperation of respondent in the preparation of said article was inconsistent with his duty to maintain the dignity of the Judiciary and the legal profession in that such publication offended the tradition and lowered the tone of the profession.

WHEREFORE, this matter will be submitted to the Court for such action as justice may require.

Dated: June 8th, 1971

By direction of the Court:

HYMAN W. GAMSO
Clerk of the Court

EXHIBIT B1

"DR 1-102 Misconduct.

"(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

EXHIBIT B2

"DR 1-103(B) Disclosure of Information to Authorities.

"(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."

EXHIBIT B3

"DR 2-101 Publicity in General

"(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein 'public communication' includes, but is not limited to, communication by means of television, radio, motion pictures, newspaper, magazine, or book.

"(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103. This does not prohibit limited and dignified identification of a lawyer as well as by name."

EXHIBIT B4

"DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

"(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

"(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

EXHIBIT B5

"EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EXHIBIT B6

"EC 8-6 • • • Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

EXHIBIT B7

"EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid mis-

understandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EXHIBIT B8

Canons of Professional Ethics

"1. The Duty of the Lawyer to the Courts

"It is the duty of the lawyer to maintain towards the Courts a respectful attitude not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievance to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

---

60 FILE COPY

JUL 21 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET No. 60

~~72-60~~

MARTIN ERDMANN,

Petitioner,

v.

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPPERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as clerk of the said Appellate Division,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

PAGE

Questions Presented 2

Statement of the Case 2

ARGUMENT—The Court of Appeals correctly held that the District Court should not exercise its jurisdiction to halt a State Court disciplinary proceeding validly instituted in the exercise of the Appellate Division's statutory power over the members of its Bar 6

Conclusion 12

Appendix 13

TABLE OF CASES

Atlantic C.L.R. Co. v. Engineers, 398 U.S. 281 (1970)

Boyle v. Landry, 401 U.S. 77 (1971) 7

Chestnut v. People of the State of New York, 370 F.2d 1 (2d Cir. 1966, Lumbard, Ch. J., Medina and Kaufman, JJ.) 10

Dombrowski v. Pfister, 380 U.S. 479 (1965) 7

Dyson v. Stein, 401 U.S. 200 (1971) 8

In re Breen, 30 Nev. 164, 93 F. 997 (1908) 8

In re Maestretti, 30 Nev. 187, 93 F. 1004 (1908) 8

In re Murchison, 349 U.S. 133 (1955) 9

In re Raggio, 487 P. 2d 499 (1971) 8

PAGE

In re Rufalo, 394 U.S. 544, 561 5

Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 158, footnote 9 (1971) 11

Matter of Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 10

Perez v. Ledesma, 401 U.S. 82, 83-85 (1971) 7

Samuels v. Mackell, 401 U.S. 66 (1971) 7

Spevack v. Klein, 385 U.S. 15 (1967) 10

Ungar v. Sarafite, 376 U.S. 575, 583-588 (1964) 10

Younger v. Harris, 401 U.S. 37 (1971) 5, 6, 7

Zuckerman v. Appellate Division, Second Department, 421 F. 2d 625 (2nd Cir., 1970) 4

STATUTES

Title 42 U.S.C.A. § 1983 ..... 5, 11

N.Y. Jud. Law § 90 6

28 U.S.C. § 2283 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO. 60

MARTIN ERDMANN,

Petitioner,

v.

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPPERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as clerk of the said Appellate Division,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents oppose the granting of petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Questions Presented

1. Whether a federal court should intervene in a state bar disciplinary proceeding to prevent its prosecution simply because the petitioner asserts that he will be "chilled" in the exercise of his First Amendment rights by being compelled to assert those rights as a defense in the disciplinary proceeding.

2. Whether this Court should grant this petition when the petitioner has available to him the right to appeal to the New York Court of Appeals from the June 27, 1972 order of the New York, Appellate Division, Third Department censuring him upon a finding (by a divided court) that "the intemperate, vulgar and insulting language • • • concededly used by respondent [petitioner] is an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system" (23a).

Statement of the Case

(1)

Plaintiff, a member of the New York Bar, was served on June 9, 1971 with a petition and charges in a professional disciplinary proceeding instituted by the Appellate Division, First Department (29a). Plaintiff was originally notified to answer the charges on June 30, 1971, but the time for him to respond was extended to September 30, 1971 (Pet., p. 6; 30a).

On September 24, 1970, plaintiff obtained an order directing the defendants to show cause before the District Court on September 28, 1970 why the state court disciplinary proceedings should not be enjoined (Pet., p. 6; 17a). The plaintiff's motion was based upon affidavits,

some of which were annexed to the order to show cause and some of which were served in Court on September 28, 1971 (Pet., p. 7; and see original District Court papers).

On September 28, 1971, the defendants moved to dismiss the complaint in this action by reason of the District Court's lack of jurisdiction over the subject matter (a state court disciplinary proceeding), its lack of jurisdiction over the "persons" of the defendants (the New York Appellate Division, First Department) within the meaning of the Civil Rights provisions invoked by the plaintiff; and by reason of the plaintiff's failure to state a claim upon which relief could be granted (17a).

(2)

An application made to the District Court for a stay of the state court proceeding was denied by District Judge Croake. He had signed the September 24, 1971 order to show cause, but deleted the paragraphs therein by which plaintiff proposed, pending the hearing of his motion, to stay the state court disciplinary proceeding. (See original District Court order on file, not completely reproduced even in petitioner's Court of Appeals appendix; cf. 27a, 28a).

A further application for such a stay was also denied on September 28, 1971, by District Judge Sylvester J. Ryan, upon the oral argument of the motion for a temporary injunction and the cross-motion to dismiss.

The plaintiff appealed to the Court of Appeals from the denial of its application for a temporary stay, and renewed such application for a stay pending a disposition of plaintiff's appeal to that Court. Oral argument on such application was held on September 30, 1971 before a panel of that Court, comprised of Judges Mansfield, Lumbard and Oakes. The application to that Court for a stay was unanimously denied from the bench.

(3)

The charges in the disciplinary proceedings were predicated, in part, upon statements attributed to plaintiff published in a Life article critical of New York trial judges. The plaintiff was charged with stating (32a):

> "And Appellate Division judges aren't any better. They're the whores who became madams."

The charges informed the plaintiff that after the filing of Erdmann's answer to the charges, the disciplinary proceeding would be transferred to an Appellate Division in another Department (See Appellate Division order to show cause, dated June 8, 1971, signed by the Clerk of the Court, at its direction (30a)).

The charges did not seek to stop Erdmann from exercising his right to appear, in the future, before any forum or discussion group. They dealt primarily with Erdmann's past conduct, the nature of his accusations against the state judiciary, and whether the statements he had allegedly made, in the past, were of the temperate and dignified nature which professional standards require (31a-37a).

(4)

District Judge Ryan, by an order entered October 1, 1971 (17a-19a) dismissed the complaint on the merits by reason of the District Court's lack of jurisdiction over the defendants because it was clear to him that the defendants, although named individually, were being sued on claims which arose "from their official action as a judicial body in the exercise of their powers and duties under the Judiciary Law as part of the Judicial System of the State of New York." He described the naming of the defendants individually as "an obvious maneuver" to avoid the holding of the Second Circuit in *Zuckerman* v. *Appellate Division, Second Department*, 421 F. 2d 625 (2nd Cir., 1970).

He further noted that since the action complained of had been taken by the judges "in their official capacity", they were immune from suit "to the same extent as when they are deciding a case in a judicial proceeding" (18a). Judge Ryan concluded by observing that the Appellate Division's jurisdiction was "exclusive and controlling" under the New York Judiciary Law; and by restating his holding that the District Court had no jurisdiction under Title 42 U.S.C.A. § 1983 (18a).

(5)

The United States Court of Appeals unanimously affirmed the District Court's dismissal of this suit. Although the Court's opinion rejected Judge Ryan's holding that a civil rights action could not be maintained against the Appellate Division "as a body" because the Justices and the Clerk had been sued as "individuals", the Court of Appeals did hold that because of the strong "comity" policy expressed in the sextet of cases headed by *Younger* v. *Harris*, 401 U.S. 37 (1971), it should not intervene to disrupt or subvert legitimate state prosecutions in which constitutional issues could be resolved by competent state trial and appellate tribunals (5a-6a).

The Court of Appeals rejected petitioner's contention that the Appellate Division, in conducting disciplinary proceedings against him, was acting not in a judicial but in an administrative capacity (6a-8a). On the subject of whether the principles of *Younger* applied equally to a "civil suit", it did not "face that issue", since it viewed a court's disciplinary proceeding against a member of its bar to be "comparable to a criminal rather than to a civil proceeding" (8a), citing *In re Rufalo*, 394 U.S. 544, 561 (8a). And it emphasized the unfair and unnecessary blow to a state court's "integrity and effectiveness" which it would suffer if subjected to "the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer" (9a).

Furthermore, it was pointed out that petitioner's "important constitutional claims would be assured of review, if necessary, by the New York Court of Appeals" (12a).

Circuit Judge Lumbard, in a concurring opinion, recognized that the series of cases, including *Younger* v. *Harris* (*supra*) in which this Court had "reaffirmed the vitality of the comity doctrine" had involved State criminal proceedings, but concluded that "when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the State and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings" (14a). With relation to the "bad faith" charged against the Appellate Division by petitioner because it had not accepted a Grievance Committee recommendation, Judge Lumbard noted that it was the judges, not the committee, which had the responsibility under N.Y. Jud. Law, § 90, of "deciding whether to begin disciplinary proceedings". Since petitioner had failed to make allegations sufficient to warrant federal injunctive relief, Judge Lumbard agreed that the complaint in this action had properly been dismissed (12a-16a).

ARGUMENT

The Court of Appeals correctly held that the District Court should not exercise its jurisdiction to halt a State Court disciplinary proceeding validly instituted in the exercise of the Appellate Division's statutory power over the members of its Bar.

(1)

Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. This fact was explicitly recognized by

Justice Black at the outset of his landmark opinion in *Younger* v. *Harris*, 401 U.S. 37, 43 (1971). This statement was not restricted to criminal prosecutions, although the *Younger* case involved an attempt to halt such a proscution.

This is not a case like that distinguished in the *Younger* case where a substantial loss of or impairment of freedoms of expression will occur if Mr. Erdman must await the state court's disposition and ultimate review in the Supreme Court of any adverse determination. Although in *Dombrowski* v. *Pfister*, 380 U.S. 479 [1965], threats of a series of prosecutions to harass Dombrowski were held to be subject to restraint, Mr. Justice Black distinguished Dombrowski from "a single prosecution brought in good faith" (401 U.S., at p. 48). See also *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); and *Perez* v. *Ledesma*, 401 U.S. 82, 83-85 (1971). Moreover, a federal injunction against state court proceedings, otherwise proper, must be based on one of the specific statutory exceptions to 28 U.S.C. § 2283. None of those exceptions is applicable here. *Atlantic C.L.R. Co.* v. *Engineers*, 398 U.S. 281 (1970).

Petitioner has sought to give this Court the impression that he has been subjected to "repeated" prosecutions by the Appellate Division. But that is not the fact. The Court instituted but a *single proceeding* on its own initiative, after it had determined *not* to follow the recommendation (7a, 8a) of the Bar Association Grievance Committee *not* to institute such a proceeding. Patently, the committee's recommendation, however persuasive, could not divest the Court of its power to make what it deemed to be the appropriate decision on the subject of whether petitioner should be charged with unprofessional conduct (15a). The fact remains that only a *single* proceeding was instituted against petitioner. He cannot eke "repetition" out of the mere circumstance that a Bar Committee's recommendation not to prosecute was rejected by the Appellate Division.

(2)

There was no showing of irreparable injury in the allegations either of the complaint or of the papers submitted in support of the temporary injunction application. *Dyson v. Stein,* 401 U.S. 200 (1971). Plaintiff's allegation that he has declined invitations to speak or participate in forums by reason of the pendency of the state proceeding is a self-serving bugbear type of statement. The state courts as well as the federal courts are subject to constant criticisms and plaintiff might just as well participate in such criticism as anyone else. Plaintiff, however, like any other member of the Bar, may reasonably be expected to adhere to professional standards in making such criticism. He also should be expected to account for any future, as well as past, statements which may deviate from professional standards in making such criticism.

(3)

Free speech does not give a lawyer the right to openly denigrate a court in the eyes of the public. *In re Maestretti,* 30 Nev. 187, 93 F. 1004 (1908); *In re Breen,* 30 Nev. 164, 93F. 997 (1908); *In re Raggio,* 487 P. 2d 499 (1971). In the per curiam opinion of the Nevada Supreme Court, it was held, in the last case (pp. 500-501):

> "The inner motivation which caused Mr. Raggio to speak out in such intemperate fashion is unknown to us and we shall not indulge in presumptions or inferences adverse to him. We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold. Conformity

with those standards has proven essential to the administration of justice in our courts. Mr. Raggio offended them, and, as recommended by the Board of Governors, we reprimand him therefor."

We do not propose to conjecture what the ultimate disposition of the disciplinary proceeding will be. The First Amendment issue has implicitly been decided against petitioner by the Third Department; but his petition here does not indicate that he has prosecuted an appeal to the New York Court of Appeals.

When this case was before the District Court, Erdmann had not even sought to put in an answer to the charges against him. The First Department, with admirable restraint, indicated that since it had preferred the charges against Erdmann, it would transfer their disposition to another Department so that it would not be acting both as "prosecutor" and judge of the charges.

The defendants herein, by transfer of the disciplinary proceeding, sought to avoid any complaint by plaintiff that prosecuting and adjudicating functions had been improperly vested in the same person or agency. Even had not that been done, there would have been no basis for *federal* interference in the State proceeding. But defendants did, with great sensitivity to plaintiff's rights, direct such a separation. And he is still not deprived of the opportunity to raise any question of bias or interest (which he may deem tenable) before the New York Court of Appeals. Even *In re Murchison,* 349 U.S. 133 (1955), contempt charges which had been preferred by the same judge as a "one-man grand jury" recognized that "interest cannot be defined with precision"; and that "Circumstances and relationships must be considered" (349 U.S., at p. 136). Clearly, the circumstances and relationships here are quite different. See *Ungar* v. *Sarafite,* 376 U.S. 575, 583-588 (1964).

(4)

Moreover, complete review of any state court disposition of the charges may be had not only in the State Court of Appeals, but also in the United States Supreme Court. *Matter of Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963); *Spevack* v. *Klein,* 385 U.S. 15 (1967). There is no reason to assume that plaintiff's constitutional rights will not be protected in the state court proceedings, or that, if ultimate review of any state court disposiiton of the charges becomes necessary, he will be prejudiced by reaching the Supreme Court through the state court route. There is no reason for this Court now to assume that plaintiff would be foreclosed from enforcing his First Amendment rights by the New York Court of Appeals. See *Chestmut* v. *People of the State of New York,* 370 F. 2d 1 (2d Cir. 1966, Lumbard, Ch. J., Medina and Kaufman, JJ.).

Petitioner's continued insistence (cf. 11a-12a) that the New York Court of Appeals is restricted in the scope of its review; and that he should not be compelled to "face the prospect of having to appeal the decision [of the Appellate Division to censure him] to the New York Court of Appeals should carry little weight with this Court.

He has been subjected to the *minimum* punishment of "censure"; and the Court of Appeals *jurisdiction* to review the *legality* of the Third Department's finding that he was "guilty of unprofessional conduct" cannot be successfully questioned. The Attorney General certainly will not dispute the petitioner's right to have the Third Department order reviewed by the New York Court of Appeals.

Nor will the Attorney General question the right to have presented to that Court either petitioner's First Amendment contentions or his more recent argument (pp. 12-13, 19) that he was entitled to have a "hearing" by the Third Department in the charges presented against him. For present purposes, we may note simply that the record here

presented by petitioner does not show that, when confronted with the motion for summary judgment made by the New York County Lawyers' representative (Daniel M. Shientag) on behalf of the Court, the petitioner attempted to present any "triable issue of fact" that would justify a hearing. On the contrary, petitioner, apart from seeking to disqualify the Appellate Division justices as "interested" parties, sought merely to have the charges dismissed "as a matter of law" as being "inadequate" (21a).

(5)

Since the petitioner has an appropriate forum (the New York Court of Appeals) available to which he can present his various legal contentions, we shall not here enter into any discussion of the validity of his First Amendment or "bad faith" (p. 9) assertions. To preserve, however, our right to present to this Court, in the event certiorari is granted, our position on that issue as well as upon the issue of whether the respondents were suable as a "person" within the meaning of 42 U.S.C. § 1983, we simply note here that, in such event, we shall contend not only that petitioner's First Amendment rights were not invaded by the disciplinary charges; and that the charges (made in good faith) do not and did not preclude criticism of judicial operations or administration or "chill" such criticism, when appropriately made; but, in addition, that the District Court's ruling on the subject of jurisdiction was correct insofar as it held (although not sustained by the Second Circuit) that the Appellate Division (or all of its Justices, even though individually named as persons instead of as a "Court") was not subject to a suit as a "person" within the meaning of the Civil Rights statute. *Cf. Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 401 U.S. 154, 158, footnote 9 (1971) where we had not pressed this jurisdictional point upon our motion to affirm and this Court did not further pursue the jurisdictional question.

CONCLUSION

Since the New York Court of Appeals is available to review petitioner's claim that his First Amendment rights have been violated and since it has not yet passed upon his other claims of error (which involve state, rather than federal law, particularly on the subject of the reviewability of all aspects of his censure order), that Court should be allowed to express its views upon the petitioner's claims. If petitioner does not take advantage of his opportunity to obtain state court review, his petition should, in any event, be rejected.

The petition for certiorari should be denied.

Dated: New York, New York, July 19, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

APPENDIX

For the Court's convenience and to make explicit the terms of the New York Appellate Division order as to the issues there raised by the petitioner, we annex hereto a copy of that Court's order, entered July 13, 1972:

> At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of June, 1972.

Present: Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Ellis J. Staley, Jr.,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. Richard D. Simons,
Associate Justices.

In the Matter of Martin Erdmann, an Attorney,

Respondent,

Justices of the Appellate Division First Department,

Petitioners.

The Justices of the Appellate Division First Department having filed a petition containing charges of professional misconduct against Martin Erdmann, who was admitted to the Bar by the Appellate Division First Department on March 11, 1940, and said proceeding having been transferred to this Department;

Now, on reading and filing the petition verified June 8, 1971; respondent's answer verified November 3, 1971; papers in support of respondent's motion for a bill of particulars; the decision of this Court dated January 14, 1972, which granted in part the motion for a bill of particulars; papers in support of petitioners' motion, returnable March 27, 1972, for an order sustaining the petition and charges; papers in support of respondent's cross motion to dismiss the petition and charges, to disqualify the justices of all Appellate Divisions, and to open and make public all prior and further proceedings; the affidavit of William Leibovitz sworn to March 21, 1972; the affidavit of Martin Erdmann sworn to March 21, 1972; affirmation by Daniel Shientag, dated March 27, 1972; and the Court having rendered a decision and *Per Curiam* opinion in which Herlihy, P.J., Staley, Jr., and Reynolds, JJ., concur, with Greenblott and Simons, JJ., dissenting in an opinion by Greenblott, J., it is

ORDERED that petitioners' motion be and hereby is granted and respondent, Martin Erdmann, be and hereby is censured; and it is further

ORDERED that respondent's cross motion to dismiss the petition and charges and to disqualify the justices of all Appellate Divisions be and hereby is denied and that said cross motion, insofar as it seeks to open and make public all prior and further proceedings herein, be and hereby is granted.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: July 13, 1972

A TRUE COPY:

JOHN J. O'BRIEN

CERTIORARI DENIED